UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES HABER, :

Petitioner, :

v. :

UNITED STATES OF AMERICA and SIGNATURE BANK, :

Respondents. :

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Civ. 14 - 8325 (LTS) (KNF)

FIRST AMENDED PETITION TO QUASH INTERNAL REVENUE SERVICE SUMMONS

1. Petitioner James Haber ("Petitioner") hereby files this First Amended Petition to Quash Internal Revenue Service Summons (the "Amended Petition to Quash") with respect to the Internal Revenue Service's administrative summons issued to Signature Bank (the "Summons"), because notice of the Summons was not served on persons identified in the Summons, including Petitioner, as required by 26 U.S.C. §§ 7609(a)(1) and 7609(c)(1). Petitioner alleges as follows:

PARTIES

2. Petitioner James Haber is a United States taxpayer who resides in New York, New York.

3. Respondents are the United States of America ("Respondent"), acting through its agency, the Internal Revenue Service (the "IRS"), and Signature Bank. Respondent has been served pursuant to 26 U.S.C. § 7609(b)(2)(B) by sending a copy of the original Petition to Quash Internal Revenue Service Summons ("Original Petition to Quash"), and will also be

served pursuant to that section by sending a copy of the Amended Petition to Quash, by certified mail to the IRS employee identified in the Summons, as follows: Revenue Officer Linda Y. Thomas, 210 E. Post Road, White Plains, New York 10601.

4. The Summons was issued to Signature Bank. A copy of the Summons (which has been redacted pursuant to Fed. R. Civ. P. 5.2(a)) is attached as **Exhibit A**. Signature Bank was served pursuant to 26 U.S.C. § 7609(b)(2)(B) by sending a copy of the Original Petition to Quash, and will be served pursuant to that section by sending a copy of the Amended Petition to Quash, by certified mail to its business address at 29 W. 38th Street, Fl. 10, New York, New York 10018. Signature Bank is named as a party to this suit in its capacity as a third-party recordkeeper under 26 U.S.C. § 7603(b)(2), because it holds the summoned records as a stakeholder. Consequently, joinder of Signature Bank as a party is required by Fed. R. Civ. P. 19. Alternatively, joinder of Signature Bank as a party is allowed under Fed. R. Civ. P. 20.

JURISDICTION AND VENUE

5. On October 1, 2014, the IRS, through its agent Revenue Officer Linda Y. Thomas, served the Summons on Signature Bank apparently pursuant to 26 U.S.C. § 7602(a)(2). The IRS did not serve notice of the Summons on persons identified in the Summons, including Petitioner, as required by 26 U.S.C. §§ 7609(a)(1) and 7609(c)(1).

6. This proceeding is brought pursuant to 26 U.S.C. § 7609(b)(2) to quash the Summons served by the IRS through its agent Linda Y. Thomas on Signature Bank, which is a third-party recordkeeper under 26 U.S.C. § 7603(b)(2). A petition to quash an IRS summons issued to a third party must be brought where the summoned third party "resides or is found." 26 U.S.C. § 7609(h)(1). Signature Bank resides or is found in this district at its business address of 29 W. 38th Street, Fl 10, New York, New York 10018, which is where the Summons was served.

7. The Original Petition to Quash was filed within the twenty day time period of 26 U.S.C. § 7609(b)(2)(A) and is timely. This Amended Petition to Quash was properly filed in accordance with Fed. R. Civ. P. 15(a) and by Order of the Court dated December 19, 2014 (Docket Entry No. 19).

8. The Summons is not a summons "issued in aid of the collection of . . . an assessment made . . . against the person with respect to whose liability the summons is issued" within the meaning of 26 U.S.C. § 7609(c)(2)(D)(i) for any of the following reasons:

(a) The Summons on its face is not limited to aid of collection. It disjunctively specifies other stated purposes for the Summons.

(b) The IRS is not limiting itself to the assets "of the person with respect to whose liability the summons is issued." Instead, the Summons is being used by the IRS for investigatory purposes, to attempt to find out who else might be liable for the penalty (as hereinafter defined) as a nominee or alter ego.

(c) The Summons cannot be in aid of collection because the person whose records were summoned is not the taxpayer against whom a liability has been assessed and that taxpayer does not have a recognizable legal interest in the summoned account.

(d) The Summons cannot be in aid of collection because the IRS is prohibited from collecting the "assessment made . . . with respect to [which] the summons is issued," for either of the following reasons:

(i) The IRS is prohibited from collecting this assessment prior to and during Collection Due

Process proceedings under 26 U.S.C. §§ 6320 and/or 6330. The IRS has not issued the required notice to initiate collection under § 6330, and a Collection Due Process proceeding is pending under § 6320.

(ii) Pursuant to 26 U.S.C. § 6331(i)(4), the IRS is prohibited from collecting this assessment because of the pending refund lawsuit referred to below.

GROUNDS FOR RELIEF

9. The Court should quash the Summons in its entirety, because notice of the Summons was not served on persons identified in the Summons, including Petitioner, as required by 26 U.S.C. §§ 7609(a)(1) and 7609(c)(1) and *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

FACTUAL BACKGROUND

10. On or about December 16, 2013, the IRS concluded an audit of The Diversified Group Incorporated and Petitioner (the "Penalty Audit") pursuant to 26 U.S.C. § 6707 for penalty associated with the alleged failure to register certain transactions (the "penalty transactions") as "tax shelters" pursuant to 26 U.S.C. § 6111 (the "penalty") and transmitted to each a Notice of Proposed Adjustment ("NOPA") reflecting some $42 million in asserted penalty. A cover letter accompanying each NOPA stated that the total penalty asserted was $24,920,904.

11. On or about February 21, 2014, The Diversified Group Incorporated ("DGI") and Petitioner each received a request, dated February 11, 2014, for payment of the penalty, in the amount of $24,920,904.

12. On or about February 28, 2014, DGI and Petitioner each paid the entire penalty determined by the IRS for a single transaction set out in the NOPAs, plus interest. The unpaid amount of the penalty asserted against Petitioner apparently is the liability that is the subject of the Summons.

13. On May 6, 2014, the IRS filed notices of federal tax lien against Petitioner for the unpaid amount of the penalty. In response to the notices of federal tax lien, Petitioner on June 2, 2014 filed a request for Collection Due Process hearing pursuant to 26 U.S.C. § 6320. Those Collection Due Process proceedings are pending. The IRS has not issued the notice that is required by 26 U.S.C. § 6330 in order for Petitioner to request a Collection Due Process hearing with respect to any proposed levy. The IRS may not levy upon Petitioner's property prior to such notice or while Collection Due Process proceedings are pending.

14. Concurrently with the payment of penalty, DGI and Petitioner each filed a refund claim with the IRS office in Ogden, Utah for the total amount paid. The IRS denied their refund claims. On July 18, 2014, DGI and Petitioner filed a lawsuit in the United States Court of Federal Claims contesting the penalty. That lawsuit is pending and is captioned The Diversified Group Incorporated and James Haber, Plaintiffs, v. United States of America, Defendant, Case No. 14-627T.

15. On October 1, 2014, the IRS, through its agent Revenue Officer Linda Y. Thomas, served the Summons on Signature Bank. The Summons states that it is "[i]n the matter of James Haber" and requests documents "relating to the tax liability or the collection of

the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above [James Haber] . . ." More specifically, the Summons requests documents relating to a particular bank account "including, but not limited to, bank statements, deposits with checks, wire transfers, etc from 1/1/2013 to present." The Summons also requests "above documents for any and all accounts that Jill Haber has signatory for."

16. Jill Haber is Petitioner's spouse. Jill Haber was never a subject of the Penalty Audit, and Respondent has not assessed the penalty against her. Petitioner does not have legal title to or an ownership interest in the accounts that are the subject of the Summons.

ARGUMENT AND AUTHORITIES

17. The Court should quash the Summons in its entirety, because notice of the Summons was not served on the persons identified in the Summons, who were Petitioner and Jill Haber. The IRS was required to serve notice of the Summons on Petitioner and Jill Haber pursuant to 26 U.S.C. §§ 7609(a)(1) and 7609(c)(1) as persons identified in the Summons, and the exception to that requirement under 26 U.S.C. § 7609(c)(2)(D)(i) does not apply. The administrative steps required by the Internal Revenue Code have not been followed. Pursuant to *United States v. Powell*, *supra*, the Summons should be quashed.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court:

1. Quash the Summons in its entirety; and

2. Grant Petitioner such other and further relief as the Court may deem just and proper.

Dated: December 22, 2014

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